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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ROBERT E. BADHAM, et al.,
Appellants,

VS.

MARCH FONG EU, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

SUPPLEMENTAL MOTION OF THE ASSEMBLY OF THE STATE OF CALIFORNIA TO DISMISS OR AFFIRM

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INTRODUCTION

In *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797 (1986), as in all the racial gerrymandering cases that preceded it, this Court held that disproportionate election results are insufficient to support a claim of unconstitutional gerrymandering. Recognizing that any proportionality test would dramatically alter our system of government and that redistricting is "a political task for the legislature, a task that should not be monitored too closely" (106 S.Ct. at 2811), this Court has consistently required that plaintiffs seeking judicial intervention show "a history of disproportionate results . . . *in conjunction with strong indicia of lack of political power and the denial of fair representation.*" *Davis, supra*, 106 S.Ct. at 2814, emphasis added.

The dissent below tacitly acknowledges that the plaintiffs in this case have not and cannot make such a showing. Indeed, the dissenter candidly states what the plaintiffs have tried so hard to obscure: that this case is exactly the same as *Davis v. Bandemer*, except that here disproportionality is alleged to have occurred over several elections. The dissenter's—and the plaintiffs'—solution to this gap in the case is to reduce the requirements for judicial intervention to nothing more than allegations of a history of disproportionate results over several elections. This is no solution at all.

The dissent's brief analysis of the alleged disproportionate effects is overstated, seriously flawed, and incomplete. But even if it were not, disproportionate election results are insufficient to support a cause of action. Indeed, under the American electoral system disproportionate election results are the norm, not the exception. They arise as a byproduct of social and constitutional decisions in favor of winner-take-all district elections, one-person-one-vote requirements, and enforcement of the Voting Rights Act.

The message of *Davis v. Bandemer* is a dual message: the plurality sought to protect insular political groups so excluded from the political process that they could not protect themselves; a majority of the Court simultaneously made it clear, however, that judicial review was not to become another tool for the powerful political parties. There is no reason to revisit these holdings here.

ARGUMENT

This Court has held that disproportionate election results—even supposedly grossly disproportionate election results—will not standing alone support a gerrymandering claim.[1]

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[1] The disproportionality alleged here is not particularly large. Republicans hold 40% of California's congressional delegation. Even assuming, arguendo, that a state's congressional delegation is a meaningful unit for purposes of a gerrymandering claim, and even using plaintiffs' votes-to-seats-ratio (a demonstrably false measure), there has been only a five to

Davis v. Bandemer, supra, 106 S.Ct. at 2810; *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971). As the *Davis* plurality held:

> [A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.
>
> *Davis v. Bandemer, supra*, 106 S.Ct. at 2810.

The Court explained:

> [T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme unconstitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections.
>
> *Ibid.*

The *Davis* plurality emphasized throughout its opinion that more than unsatisfactory election results must be alleged.[2] *See, e.g.*, 106 S.Ct. at 2809, 2810, 2814. It did so not only by reference to the single election at issue there but also by reference to the race cases in which even decades of disproportionality were

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ten percent disparity between the percentage of seats won by Republicans and the Republican percentage of the cumulative statewide vote. See Mot. of the Assem. of the State of Calif. to Dismiss or Affirm at p. 20, n. 18.

[2] To the extent the comment of the dissenting judge below that "[i]t is alleged that virtually all competition has been eliminated in congressional elections" (Pet. for Reh. at 2a) raises a question separate from the alleged disproportionality, it has been answered by this Court in *Whitcomb*:

> [W]e have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called "safe" districts where the same party wins year after year.
>
> 403 U.S. at 153.
>
> *See also Davis, supra*, 106 S.Ct. at 2809, 2814-15; *Gaffney v. Cummings*, 412 U.S. 735, 752-54 (1973).

insufficient to support a claim unless accompanied by a lack of political power and denial of fair representation.

In *Whitcomb v. Chavis*, this Court rejected a claim of racial gerrymandering based upon the distinction between election results and pervasive degradation of political influence:

> The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is beng denied access to the political system.
>
> 403 U.S. at 154.

After repeatedly emphasizing that a group's defeat at the polls—even repeated defeat at the polls—was not the same as having its voting power "cancelled out" (*e.g., id.* at 153, 156), this Court concluded:

> The short of it is that we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them.
>
> *Id.* at 160.

This distinction between election results and political power led this Court to deny the claims of Indiana Democrats in *Davis v. Bandemer*. There is no reason to abandon the distinction in favor of California Republicans, particularly on the record presented here.

First, plaintiffs' claims of disproportionality are all premised upon the votes-to-seats ratio, a demonstrably false measure. *See* Mot. of Assem. of the State of Calif. to Dismiss or Affirm at pp. 20-22.[3] Moreover, plaintiffs' obsession with the party label of the

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[3] The dissent's recital of a "history" of disproportionate results in California, starting in 1980, is also seriously flawed. In 1980, the last election under the 1970 plan, when Republicans achieved the greatest number of congressional seats, California districts were at their worst

candidates ignores the "context of California politics". *Storer v. Brown*, 415 U.S. 724, 742 (1974). In California, the individual has long been more important than the party. See Mot. of Assem. of the State of Calif. to Dismiss or Affirm at p. 21.

Second, even accepting plaintiffs' measure, the alleged disproportionality in the 1980s under the challenged plan has been no greater than the disproportionality in the 1970s under a plan developed by court-appointed masters, a plan which plaintiffs held up to the lower court as a prototype of fair districting. *See* Mot. of the Assem. of the State of Calif. to Dismiss or Affirm at pp. 19-20, n. 18.

Third, the disproportionality alleged here does not begin to compare either in scope or duration with the race cases in which minority races often experienced decades of no representation whatsoever yet were denied relief. Mot. of Assem. of the State of Calif. to Dismiss or Affirm at pp. 16-18. Indeed, even with the addition of two Hispanic seats in the congressional districts challenged here, minorities in California enjoy much less proportional representation in the congressional delegation than do Republicans.

Finally, and most importantly, the record in this case demonstrates that California Republicans enjoy considerable political presence and influence at all levels of government. *See* Mot. of Assem. of the State of Calif. to Dismiss or Affirm at pp. 23-25. They are not in any sense "shut out of the political process."

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under the one-person-one-vote standard. The 1982 elections were conducted under a court-ordered plan, not the one challenged here. *Assembly v. Deukmejian*, 30 Cal.3d 638, 678, *appeal dismissed sub. nom. Republican National Committee v. Burton*, 456 U.S. 941 (1982). Twenty-eight Democrats and seventeen Republicans were elected. In 1984, the first election under the challenged plan, a Republican candidate (Robert Dornan) won a seat that the plaintiffs in this case claimed was gerrymandered in favor of the Democrats. Finally, the reelection of incumbents in most districts is simply a fact of American political life, not a mark of partisan gerrymandering; the voters in this country, with rare exceptions, tend to reelect incumbents. This is equally true in states where congressional districts have not been challenged as gerrymandered.

Davis v. Bandemer, supra, 106 S.Ct. at 2814. Nor has the electoral system been "arranged in a manner that will consistently degrade [their] influence on the political process as a whole." *Id.* at 2810. Assessed "in the light of past and present reality, political and otherwise" (*White v. Regester*, 412 U.S. 755, 769-70 (1973)), plaintiffs' suit is clearly without merit.

To entertain plaintiffs' claim, this Court would not only have to turn its back on established jurisprudence, it would also have to blind itself to the enormous political power exercised by California Republicans. There is no reason in law or common sense to do so.

CONCLUSION

The unprecedented standard for judicial intervention proposed by plaintiffs and the dissenting district court judge would have federal courts second-guessing redistricting plans whenever a series of real or "projected" elections presents disproportionate results. As the plurality said in *Davis v. Bandemer*, "such a low threshold for legal action would invite attack on all or almost all reapportionment statutes" and is "contrary to the . . . conception of an unconstitutional political gerrymander." 106 S.Ct. at 2811.

The appeal should be dismissed or the judgment below summarily affirmed.

December 14, 1988

Respectfully submitted,

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